

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

9	UNITED STATES OF AMERICA,)	No. CR-F-98-5149 OWW
10)	
11	Plaintiff/)	MEMORANDUM DECISION AND
12	Respondent,)	ORDER DENYING PETITIONER
13	vs.)	OSCAR RODRIGUEZ'S SECOND
14	OSCAR RODRIGUEZ,)	MOTION FOR MODIFICATION OF
15)	SENTENCE PURSUANT TO 18
16	Defendant/)	U.S.C. § 3582(c) (2)
17	Petitioner.)	

18 On August 31, 2009, Petitioner Oscar Rodriguez, proceeding
19 *in pro per*, filed a second motion for modification of sentence
20 pursuant 18 U.S.C. § 3582(c) (1), contending that he is entitled
21 to modification of his sentence pursuant to Amendment 591 to the
22 Sentencing Guidelines.¹

23 Petitioner was found guilty by jury verdict of conspiracy to

24
25 ¹On May 27, 2008, Petitioner filed a motion to correct
26 sentence pursuant to 18 U.S.C. § 3582(c) (2), based on Amendment 715
to the Sentencing Guidelines. This motion was denied by Order
filed on July 24, 2008.

1 distribute and to possess with intent to distribute cocaine in
2 violation of 21 U.S.C. §§ 841(a)(1) and 846. Petitioner was
3 sentenced on May 30, 2000 to a term of imprisonment of 235
4 months. Petitioner's conviction and sentence were affirmed on
5 appeal. *United States v. Rodriguez*, 2002 WL 1881119 (9th
6 Cir.2002). Petitioner's motion to vacate, set aside or correct
7 sentence pursuant to 28 U.S.C. § 2255 was denied by Order filed
8 on July 23, 2004.

9 There is no dispute that Amendment 591 is retroactive and
10 that Petitioner may seek a reduction of sentence pursuant to
11 Section 3582(c) based on retroactive application of Amendment
12 591.²

13 Prior to Amendment 591, §1B1.1(a) of the Sentencing
14 Guidelines provided:

16 ²18 U.S.C. § 3582(c)(2) provides in pertinent part:

17 (c) Modification of an imposed term of
18 imprisonment. - The court may not modify a
19 term of imprisonment once it has been imposed
except that -

20 ...

21 (2) in the case of a defendant who has been
22 sentenced to a term of imprisonment based on a
23 sentencing range that has been subsequently
24 lowered by the Sentencing Commission pursuant
25 to 28 U.S.C. 994(o), upon motion of the
defendant ..., the court may reduce the term
of imprisonment, after considering the factors
set forth in section 3553(a) to the extent
that they are applicable, if such a reduction
is consistent with applicable policy
statements issued by the Sentencing
Commission.

(a) Determine the applicable offense guideline section from Chapter Two. See §1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.

§1B1.2(a) provided:

Determine the offense guideline in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). Provided, however, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

Effective November 1, 2000, pursuant to Amendment 591, these Sentencing Guidelines sections were amended:

Section 1B1.1 is amended by striking subsection (a) in its entirety and inserting:

'(a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.'

Section 1B1.2(a) is amended by striking 'most' each place it appears; by striking 'Provided, however' and inserting 'However'; and by adding at the end the following:

'Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the

Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).'

Amendment 591 sets forth the "Reason for Amendment:"

This amendment addresses a circuit conflict regarding whether the enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug sales in a protected location or involving a protected individual

In promulgating this amendment, the Commission also was aware of case law that raises a similar issue regarding selection of a Chapter Two (Offense Conduct) guideline, different from that referenced in the Statutory Index (Appendix A), based on factors other than the conduct charged in the offense of conviction

The amendment modifies §§1B1.1(a), 1B1.2(a), and the Statutory Index's introductory commentary to clarify the inter-relationship among these provisions. The clarification is intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited 'stipulation' exception set forth in §1B1.2(a). Therefore, in order for the enhanced penalties in §2D1.2 to apply, the defendant must be convicted of an offense referenced to §2D1.2, rather than simply have engaged in conduct described by that guideline. Furthermore, the amendment deletes Application Note 3 of §1B1.2 (Applicable Guidelines), which provided that

1 in many instances it would be appropriate for
2 the court to consider the actual conduct of
3 the offender, even if such conduct did not
4 constitute an element of the offense. This
5 application note describes a consideration
6 that is more appropriate when applying §1B1.3
7 (Relevant Conduct), and its current placement
8 in §1B1.2 apparently has caused confusion in
9 applying that guideline's principles to
determine the offense conduct guideline in
Chapter Two most appropriate for the offense
of conviction. In particular, the note has
been used by some courts to permit a court to
decline to use the offense guideline
referenced in the Statutory Index in cases
that were allegedly 'untypical' or 'outside
the heartland.'

10 Petitioner contends that "the jury made no finding as to the
11 quantity of drugs in either the attempt or conspiracy offense."

12 Therefore, Petitioner asserts:

13 Amendment 591 is the appropriate vehicle,
14 because, of the selection of the offense
15 relevant guideline. Furthermore, Amendment
16 591 stated that if the offense involved a
17 conspiracy, or attempt, or solicitation refer
18 to guideline, under 2X1.1. Moreover, the
19 petitioner's assert that he did no(t)
20 completed the substantive offense. However,
21 the arrest occurs well before, the
22 petitioner's has completed the acts,
23 necessary for the substantive offense. For
24 this reason a decrease of Three (3) level is
25 provided under Scc. 2X1.1(b) or (2). From
26 Level (38), to Level (35) [sic].

20 Petitioner's motion is without merit. Pursuant to the
21 Presentence Investigation Report, which used the 1998 Sentencing
22 Guidelines:

23 22. Base Offense Level: The defendant was
24 convicted of violation of 21 USC 841(a)(1)
25 and 846, Conspiracy to Distribute and Possess
26 with the Intent to Distribute Cocaine. The
applicable guideline for this offense is
found under USSG 2D1.1. The base offense

1 level is predicated on the amount of drugs
2 involved. As the defendant was found guilty
3 of a conspiracy count, pursuant to USSG
4 1B1.3(a)(1)(B), in the case of a jointly
5 undertaken criminal activity (a criminal
6 plan, scheme, endeavor, or enterprise
7 undertaken by the defendant in concert with
others, whether or not charged as a
conspiracy), the offense level calculations
shall be determined considering all
reasonably foreseeable acts and omissions of
others in furtherance of the jointly
undertaken criminal activity.

8 23. In this offense, at the time of the
9 defendant's arrest, over 350 kilograms of
cocaine was seized, all of which was
10 foreseeable and attributable to the defendant
Pursuant to USSG 2D1.1(c)(1), 350 kilograms
11 of cocaine equates to a base offense level of
38, the highest level identified in the Drug
Quantity Table.

12 Amendment 591 applies to the selection of the offense level
13 guideline, not to the base offense level. *United States v.*
14 *Rivera*, 293 F.3d 584, 586 (2nd Cir.2002); *United States v.*
15 *Moreno*, 421 F.3d 1217, 1220 (11th Cir.2005), cert. denied, 547
16 U.S. 1050 (2006). Here, the offense level guideline, USSG §2D1.1
17 was based on the statute of conviction, not on other conduct.
18 Petitioner's contention that he is entitled to modification of
19 his sentence pursuant to Amendment 591 because the Court, not the
20 jury, determined the amount of drugs involved in the offense of
conviction, is without merit. Petitioner's argument is based on
22 the Supreme Court decisions in *Apprendi*, *Blakely* and *Booker*.
23 Under the plain language of Section 3582(c)(2), only changes to
24 the Sentencing Guidelines made by the Sentencing Commission after
25 the defendant's sentencing hearing, not Supreme Court decisions,
26

1 can be used as a basis for a Section 3582(c) (2) motion.

2 Petitioner's reference to USSG §2X1.1 is unavailing. USSG
3 §2X1.1 pertains to "Attempt, Solicitation, or Conspiracy (Not
4 Covered by a Specific Offense Guideline)" and provides:

5 (a) Base Offense Level: The base offense
6 level from the guideline for the substantive
offense, plus any adjustment from such
guideline for intended offense conduct that
7 can be established with reasonable certainty.

8 Petitioner's base offense level was determined under §2D1.1.

9 Application Note 1 to §2X1.1 explains that certain attempts,
10 conspiracies, and solicitations are covered by other offense
11 guidelines and states that offense guidelines that expressly
12 cover conspiracies include §2D1.1. Because Petitioner's offense
13 was covered by a specific offense guideline, §2X1.1 does not
14 apply and provides no basis for modification of Petitioner's
15 sentence. See *United States v. Smith*, 2004 WL 259228 (6th Cir.),
16 cert. denied, 541 U.S. 1082 (2004); *United States v. Augarten*,
17 2003 WL 23095537 (6th Cir.2003), cert. denied, 541 U.S. 1004
18 (2004); *United States v. Shipp*, 2002 WL 1732603 (7th Cir.2002).

19 Petitioner's contention that he is entitled to modification
20 of his sentence because he was arrested before he completed the
21 acts necessary the crime of conspiracy of which he was convicted
22 is barred by the express terms of Section 3582(c) (2) and by the
23 fact that his conviction has been affirmed on appeal and his
24 Section 2255 motion denied. Amendment 591 has no relevance to
25 these claims.

26 For the reasons stated:

1. Petitioner Oscar Rodriguez's motion for modification of sentence pursuant to 18 U.S.C. § 3582(c)(2) is DENIED.

IT IS SO ORDERED.

Dated: September 14, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE